No. 15, 716

In the United States
Court of Appeals
For the Ninth Circuit

BEVERLY B. BISTLINE,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF FOR THE APPELLEE

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OPINION BELOW

The memorandum opinion of the District Court (R. 21-25) is reported at 145 F. Supp. 800.

JURISDICTION

This appeal involves federal income taxes. Appellant filed timely income tax returns for the years 1947 and 1948 and thereafter the Commissioner of Internal Revenue assessed and collected additional taxes, in the amount of $396.54 for 1947, and in the amount of $2,787.42 for 1948. (R. 26-27.) After payment claims for refund were filed on March 4, 1952, and were rejected on April 8, 1953. Within the time provided in Section 3772 of the Internal Revenue Code of 1939, and on March 7, 1955, the taxpayer brought an action in the District Court for recovery of the taxes paid. (R. 3-17.) An answer was filed on behalf of the United States on May 9, 1955. (R. 17-21.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346. Judgment was entered on June 14, 1957. (R. 29.) Within sixty days and on August 9, 1957, a notice of appeal was filed. (R. 30.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court correctly held that the real property sold by taxpayer in 1947 and 1948 had been held primarily for sale to customers in the ordinary course of business within the meaning of Section 117 of the Internal Revenue Code of 1939, so that the profit realized should be taxed as ordinary income rather than as capital gain.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) [As amended by Section 151 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Definitions.*—As used in this chapter—

(1) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include * * * property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * * or * * * real property used in the trade or business of the taxpayer;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

STATEMENT

The pertinent facts as found by the District Court may be stated as follows:

Taxpayer, Beverly B. Bistline, a resident of Pocatello, Idaho, filed timely income tax returns for the years 1947 and 1948 and reported thereon the profit realized from the sale of certain real estate as long term capital gains. After investigation the Commissioner of Internal Revenue determined that these profits were taxable as ordinary income and accordingly assessed and collected additional income taxes for these years. (R. 26-27.)

On July 1, 1947, the taxpayer's parents transferred approximately 200 lots of improved and unimproved real estate in and near the City of Poca-

tello, Idaho, to her by means of two deeds of gift. At the time of transfer taxpayer was 24 years of age and employed as the business manager of the Pocatello Transit Company, one of her father's business enterprises. (R. 27.)

Soon after receipt of these properties, taxpayer began to sell them. The first sale occurred on August 5, 1947. During 1947 she sold five lots and realized a net profit of $2950. During 1948 she sold 123½ lots in four separate transactions for a net profit of $19,148.75. (R. 22, 27.)

Taxpayer's father, F. M. Bistline, negotiated the sale of all these properties subject to her counsel and consent. Along with his practice of law and management of sundry business enterprises, F. M. Bistline was engaged in the selling, dealing in and with real estate during the years 1947 and 1948. (R. 27.)

After taxpayer received this real estate from the parents, she was frequently and continuously engaged in the negotiation and/or consummation of the sale of her properties. (R. 27-28.)

The frequency, continuity and substantiality of the real estate sales transactions constituted a "business activity" within the general meaning and usage of that term. The real estate sold by taxpayer in 1947 and 1948 was held by her primarily for sale to customers in the ordinary course of her business, and was not held as an investment. (R. 28.)

The District Court accordingly held that the gain realized from such sales was taxable as ordinary income for federal income tax purposes. (R. 28).

SUMMARY OF ARGUMENT

On July 1, 1947, taxpayer received from her par-

ents by two deeds of gift 200 real estate lots in and near the city of Pocatello, Idaho. Almost immediately she began to dispose of this property, the first sale occurring within five weeks of acquisition. During an eleven-month period extending into 1948 taxpayer sold 128½ lots in seven transactions and realized a net gain therefrom of $22,098.75.

The question on appeal is whether the District Court correctly held this gain to be taxable as ordinary income derived from sales of property held primarily for sale to customers in the ordinary course of taxpayer's business. The question is one of fact and the District Court employed the tests for deciding the issue which have many times been approved by this Court. The evidence supports the court's holding.

Taxpayer's contention that the property was held for investment is refuted by her prompt sales and continued dealings in real estate extending beyond the tax years involved in conjunction with her father. The evidence clearly shows taxpayer held her property for sale.

Nor can taxpayer deny she was engaged in business because she was a "full-time" employee of her father's transit line and because the sales were handled through her father acting as her business agent. A taxpayer may have more than one business or occupation and this Court has many times held that a taxpayer cannot isolate himself from the actions of his agent.

Here taxpayer's agent, her father, was in the business of selling and dealing in real estate. He held the lots for sale in the course of business after he executed the deeds of gift as well as before execution.

Taxpayer accepted her father's business judgment and he utilized the proceeds from the sales as he best saw fit. No accounting has been rendered. A family corporation was formed in 1948 for the purpose of handling some of the family real estate business but the plans were never fully carried out. Thus, it is difficult if not impossible to consider taxpayer's real estate business apart from her father's business.

Taxpayer's gains were properly treated as ordinary income.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE REAL PROPERTY SOLD BY TAXPAYER IN 1947 AND 1948 WAS HELD PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF HER BUSINESS.

Taxpayer appeals from a judgment of the District Court holding that the gain realized by her from sale of real estate in 1947 and 1948, acquired from her parents by gift in July, 1947, was taxable as ordinary income rather than capital gain.

The pertinent statutory provision, Section 117 of the 1939 Code, *supra*, which defines capital assets, excludes "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business * * *." If the property which a taxpayer sells is held primarily for sale in the ordinary course of his business, the gain realized on the sale is to be taxed as ordinary income.

A. *Criteria used in deciding the issue*

Whether or not the present taxpayer's property

Taxpayer asserts that two special situations are present in the instant case. "One had to do with a parent conveying property to a child, and the other has to do with a parent giving counsel and advice and assisting in handling sales." (Br. 9.)

Apparently, taxpayer seeks to establish from the nature of the acquisition the premise that the properties were held for investment. She avers that her father so held them prior to gift (Br. 12), and cites *Sparks* v. *United States*, 55 F. Supp. 941 (M.D. Ga.). There a parent who held land for investment transferred it by gift to his son who two years later made some improvements and sold a portion to liquidate a debt. The profit realized was taxed as capital gain. The difficulty with taxpayer's contention and case authority is that they do not accord with the facts at hand. The court below found taxpayer's father was engaged in the real estate business. (R. 27.) Cf. *Bistline* v. *United States*, 145 F. Supp. 802 (Idaho), on appeal to this Court. Thus, before deeding these various properties to his daughter, Mr. Bistline was holding them for sale to customers. After he deeded them to taxpayer he still held these properties for sale, as will be demonstrated, with the single difference that he was then acting as her agent. Taxpayer made her first sale within five weeks of acquisition. 1/ Thus, the holding was for sale, not investment.

Furthermore, the purpose or reason for acquisition is not considered as important as the purpose for which the property is being held just prior to sale. *Richards* v. *Commissioner*, 81 F. 2d 369, 372-373 (C.A. 9th); *Rollingword Corp* v. *Commissioner*,

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1/ Indeed, as to one property sales negotiations were completed before the property was even deeded to taxpayer.

supra, p. 266; *Mauldin* v. *Commissioner*, 195 F. 2d 714, 717 (C.A. 10th); *Friend* v. *Commissioner*, 198 F. 2d 285, 288 (C.A. 10th).

Next, taxpayer cites *Gruy* v. *Commissioner*, decided August 29, 1949 (1949 P-H T.C. Memorandum Decisions, par. 49,217), and *Storrow* v. *United States*, 99 F. Supp. 672 (S.D. Cal.). In *Gruy* taxpayers inherited property from their mother. While in schools or military service some sales were made for them by their father without solicitation. He was not in the real estate business. In *Storrow* an ill woman made three sales of inherited property which she had owned for 22 years through a bank as trustee—the first, a sale of lots in bulk, the second, a restaurant building and the third, 11.44 acres of land.

Taxpayer says she was a full time employee of the transit company. Here, however, as we have pointed out, her father, who was her business agent, was in the real estate business, and taxpayer cannot isolate herself from the activities of her parent in her behalf. It was stated in *Welch* v. *Solomon*, 99 F. 2d 41, 43 (C.A. 9th):

> The personal attention which a taxpayer gives to a business is certainly not decisive as to whether a resulting profit is ordinary income or capital gain. One may conduct a business through others, his agents, representatives, or employers. The business is nonetheless his because he chooses to let others bear all of the burdens of management.

There the business was operated by a trust, the income of which was currently distributable. In

Richards, supra, Boeing, supra, and *Ehrman, supra,* the business was carried on through agents. A taxpayer may have more than one occupation or business. *Friend* v. *Commissioner,* 198 F. 2d 285 (C.A. 10th), and *Fackler* v. *Commissioner,* 133 F. 2d 509 (C.A. 6th).

Nor was taxpayer's position totally passive. In consultation with her father as business agent (R. 47), the court found she was "frequently and continuously engaged in the negotiation and/or consummation of the sale of her properties." (R. 27-28.)

But, as suggested above, the frequency and continuity of transactions and business activities need not be judged on taxpayer's actions alone. There is no dispute that Mr. Bistline handled all of his daughter's real estate transactions as taxpayer's business agent. He was in the real estate business. Taxpayer never failed to follow her father's counsel. (R. 50, 62.) As we have pointed out, before the deeds of gift the father held the property for sale in his real estate business. Afterwards he still held them for sale as taxpayer's agent. The Bise Corporation was described as a family undertaking (R. 51, 60), and the pronoun "we" appears repeatedly (R. 60-62, 70). Taxpayer's father handled the proceeds from the sales as he best saw fit. He has never given taxpayer an accounting (R. 68-69.)

The family relationship reflected by the record, giving effect to taxpayer's interest, is one in the nature of agency. A similar relationship obtained between husband and wife in *Shepherd* v. *United States,* 139 F. Supp. 508 (E.D. Tenn.), affirmed *per curiam,* 231 F. 2d 445 (C.A. 6th), where the court held the profits realized from a husband's sale of his

wife's property to be taxed as ordinary income to her. Mr. Shepherd was and had been in the real estate business for many years. In 1932 he transferred most of his unimproved property to his wife. In 1948 Mr. Shepherd sold four of these properties. It was established that Mrs. Shepherd (pp. 512-513) "was a housewife, holds no real estate license, made no improvements to the vacant lots which she held, [and] conducted no active advertisement or solicitation for sales * * *." It also appeared that she had no (p. 512) "connection with her husband's agency in selling or dealing in property except that which belonged to her." The court found, however, that (p. 512):

> * * *as to the property which she did own the facts show the existence of the principal and agent relationship between herself as principal and her husband and members of his agency as her agents, for without exception the members of that agency handled her sales and received substantial benefits therefrom in the form of occasional commissions to individual salesmen and in the form of income to which its owner, Mr. Shepherd, had unlimited access "for use in his business or whatever was needed."
>
> [Accordingly] Despite the relatively small number of sales the whole case indicates throughout that Mrs. Shepherd's property was looked upon and dealt with not as investment property but as a means for producing a relatively constant and substantial income "for her private estate."

To repeat, the relationship found to exist here requires the business to be judged not merely by tax-

payer's activities alone but also in the light of those carried on by her father in her behalf with the result that the profits realized from the sales of her real estate must be taxed as ordinary income, just as the court held in the *Shepherd* case, *supra*. Cf. *Sommers* v. *Commissioner*, 195 F. 2d 680 (C.A.2d).

Perhaps the contention taxpayer emphasizes most is that her real estate dealings were not large enough to be a business. But size is a relative thing. A business may be small as well as large. It is submitted that the activities and sales were appropriate to Pocatello. Taxpayer and her father were dealing in vacant lots. While there is some dispute in the record over the extent of the listings with the former Bistline Realty Company and advertising of Bistline properties (R. 58, 64-67), it was agreed by taxpayer, her father and Mr. Smith, that advertising was not too necessary or desirable a way to sell lots in Pocatello because of buyer demand and because of the compensation involved in that kind of real estate. (R. 52, 59-60, 63). Taxpayer realized an income of $22,098.75 in an eleven month period from the sale of 128½ lots in seven transactions. For a young lady, age 24, this would seem rather substantial business income.

Taxpayer was not "liquidating" her holdings. Sales commenced with her acquisition of the two hundred lots by gift and continued after the years in question. (R. 50-51.) In 1948 a family corporation was formed for real estate dealings, particularly contracts and mortgages. (R. 51, 61.) It did not become fully operational. (R. 60-61.) Taxpayer could not state how many lots she presently owned. (R. 51.) However, she subsequently estimated $36,000 in contracts and mortgages and $10,000 in real

estate. She said (R. 68):

> I arrive at the $10,000 valuation by estimating the present value of the number of lots that I have. I am not sure exactly how many. I made the estimate with the advice of my father. The real estate contracts were the result of real estate sales. The mortgages went to people who came in to borrow money. My father was acting as my advisor to make investments for me and as such money was available to my father for loans. Some of the $36,000 is in mortgages and some of it is in contracts. I wouldn't say that I have had many more mortgages than I have now. As a result of the real estate sales we have had money to invest in loans and other property and other investments.

In support of her position taxpayer has cited only three distinguishable trial court decisions which were not appealed by the Government. She then states (Br. 13):

> In our search of the cases we have noted that in each instance where the taxpayer has been allowed capital gain treatment on the sales of real estate the government has chosen not to appeal, *which would indicate that taxpayers should be allowed the relief granted them by the law with regard to long term capital gain in cases such as the one here.* (Italics supplied.)

We suggest a more accurate conclusion to draw from taxpayer's observation would be that the failure to seek appellate review in many instances represents a recognition of the proper weight to be given

the judgment of the trier of the fact, noted earlier herein. 2/

In *Rollingwood* v. *Commissioner*, *supra*, this Court pointed out that most of the cases dealing with the problem of whether property is held primarily for sale to customers in the ordinary course of trade or business involve situations where the taxpayer is engaged in some activity apart from his usual occupation and the question is whether this activity amounts to a business. In considering that question in connection with the facts involved there, this Court then stated (pp. 266-267):

> The capital gains provisions are remedial provisions. Congress intended to alleviate the burden on a taxpayer whose property has increased in value over a long period of time from having the profits from sales taxed at graduated tax rates designed for a single year's income. The purpose is to protect "investment property" as distinguished from "stock in trade," or property bought and sold for a profit. It is our view that this policy was not meant to apply to a situation where one of the essential purposes in holding the property is *sale*.

The District Court concluded taxpayer had failed to carry her burden of proving that the properties sold in 1947 and 1948 were held primarily for investment rather than primarly for sale. Such conclusion is not erroneous.

2/ The Government has, of course, appealed cases involving this issue when it believes a proper basis for appellate review exists. Welch v. Solomon, 99 F. 2d 41 (C.A. 9th), and Commissioner v. Boeing, 106 F. 2d 305 (C.A. 9th), are examples of such appeals.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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